No. 89/683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT B. WATERHOUSE,

Petitioner,

vs.

RAMON J. RODRIGUEZ,
Chairman of the New York State Board of Parole, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENTS

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18 pp

QUESTIONS PRESENTED

1. Whether the Sixth Amendment right to counsel is violated where a criminal defendant's licensed attorney is disbarred on the final day of a pretrial hearing for conduct unrelated to that defendant's representation?

2. Whether a federal evidentiary hearing in the context of a habeas corpus petition is mandatory where the state trial court has made findings of fact and law which are supported by the record of the state court hearing?

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STATEMENT OF THE CASE

Factual Background

On April 11, 1966, the Suffolk County, New York Grand Jury indicted petitioner for Murder in the First Degree and Burglary in the Second Degree. The charges arose from the brutal sexual assault and strangulation of seventy-six year old Ella Mae Carter in her home. On February 12, 1966, petitioner had provided Suffolk County police detectives

with a written statement in which he admitted being present in Mrs. Carter's home and being involved in an altercation with her at about the time of her death.

On November 14 and 15, 1966, the state trial court conducted a Huntley hearing to determine the admissibility of petitioner's written statement. People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965). Mr. Edward LaFreniere, a licensed New York State attorney, represented petitioner at the hearing. The state court completed the hearing at 12:18 p.m. on November 15, concluded that petitioner's statement was voluntarily made and began jury selection. Mr. LaFreniere was disbarred by order dated November 15, 1966, for misappropriation of client funds and failure to provide representation after accepting fees. See Suffolk County Bar Association v. LaFreniere, 26 A.D.2d 946 (2d Dept. 1966), appeal dismissed, 19 N.Y.2d 809 (1967).

Approximately four months later, on

March 6, 1967, jury selection began for the second time with petitioner represented by court appointed counsel Mr. Harry Brown. Trial testimony ensued and on March 13, 1967, petitioner, on Mr. Brown's advice, withdrew his not guilty plea, and entered a plea of guilty to a reduced charge of Murder in the Second Degree. Petitioner was sentenced to serve a minimum of twenty years and a maximum of life incarceration. Petitioner timely appealed his conviction without success in the New York State courts. People v. Waterhouse, 38 A.D.2d 1010, 331 N.Y.S.2d 372 (2d Dept. 1972); People v. Waterhouse, 35 N.Y.2d 688, 361 N.Y.S.2d 160, 319 N.E.2d 422 (1974). Petitioner was released to parole in 1975.

Subsequent Proceedings

Petitioner was subsequently convicted of another vicious sexually motivated murder in the state of Florida and was sentenced to the death penalty based in part on the prior New York murder conviction. Waterhouse v. State, 429 So.2d 301 (Fla.), cert. denied, 464 U.S.

977 (1983).

On December 19, 1986, approximately nineteen years after his New York murder conviction, petitioner sought federal habeas corpus review of that conviction for the first time in an effort to subvert the Florida death sentence. Petitioner alleged primarily that he was denied his Sixth Amendment right to counsel because LaFreniere had been disbarred on the final day of the Huntley hearing, and that his written statement, which was the subject of that hearing, had been obtained in violation of his Fifth, Sixth and Fourteenth Amendment rights.

The Eastern District Court determined that LaFreniere's disbarment warranted application of the per se ineffective assistance of counsel rule enunciated by the Second Circuit Court of Appeals in Solina v. United States, 709 F.2d 160 (2d Cir. 1983) and granted petitioner's writ. Waterhouse v. Rodriguez, 660 F.Supp. 319 (E.D.N.Y. 1987).

On appeal to the Second Circuit, the

Court of Appeals held that Solina "does not apply to the facts of this case" and remanded the case to the District Court for a determination of the coerced confession claim. Waterhouse v. Rodriguez, 848 F.2d 375 (2d Cir. 1988). On remand the District Court denied petitioner's motion for an evidentiary hearing on the coerced confession claim and dismissed the habeas corpus petition. The Second Circuit Court of Appeals affirmed the District Court's dismissal of the petition by summary order.

Petitioner ultimately gained a reversal of the Florida death sentence in other proceedings and is scheduled to receive a new sentencing phase in the Florida State courts. Waterhouse v. State, 522 So. 2d 341 (Fla.), cert. denied, Dugger v. Waterhouse, 109 S.Ct. 178 (1988).

I. REASONS FOR NOT GRANTING THE WRIT

THE COURT OF APPEALS DECISION ON PETITIONER'S SIXTH AMENDMENT CLAIM IS CONSISTENT WITH THE DECISIONS RENDERED BY THIS COURT AND THOSE RENDERED BY SISTER CIRCUIT COURTS.

It is undisputed that a pretrial suppression hearing is a crucial stage of a criminal proceeding which requires that the defendant be afforded the Sixth Amendment right to counsel within the boundaries established for effective assistance of counsel. See e.g. Strickland v. Washington, 466 U.S. 668 (1984); Powell v. Alabama, 287 U.S. 45 (1932). The case at bar, however, presents a much narrower issue for consideration.

Petitioner was represented at the outset of ~~his~~ Huntley hearing by a licensed attorney who was subsequently disbarred by order entered on the final day of that hearing for reasons not related to petitioner's case. A fair reading of the record reveals that immediately thereafter the proceedings were halted, and the disbarred attorney made no further appearances in petitioner's case. In fact, a new attorney was appointed who represented petitioner from jury selection until the conviction upon his plea of guilty.

Although the United States Court of Appeals for the Second Circuit has enunciated a per se ineffective assistance of counsel rule which it has invoked sparingly to address cases involving egregious conduct such as imposters posing as licensed attorneys, and attorneys engaged in conduct which gives rise to conflict of interests considerations, United States v. Cancilla, 725 F.2d 867 (2d Cir. 1984); Solina v. United States, 709 F.2d 160 (2d Cir. 1983) that court specifically refused to apply the per se rule to the facts of this case. See Waterhouse v. Rodriguez, 848 F.2d at 377.

In accord with the Second Circuit's holding above, the United States Court of Appeals for the Ninth Circuit has also recognized a distinction between those cases where trial counsel was never licensed or admitted to practice law, and was therefore an imposter, and those cases such as the instant case where a licensed attorney is disbarred during the proceedings for conduct not related to those proceedings. The Ninth

Circuit reasoned that:

> "The principle applied in such cases is that one never admitted to practice law and therefore who never acquired the threshold qualification to represent a client in court cannot be allowed to do so, and no matter how spectacular a performance may ensue, it will not constitute 'effective representation of counsel' for purposes of the Sixth Amendment. Conversely, the infliction of discipline upon an attorney previously qualified and in good standing will not and should not transform his services into ineffective assistance." United States v. Mouzin, 785 F.2d 682 (9th Cir. 1986), cert. denied, 469 U.S. 1039 (1986).

Moreover, this Court has demonstrated a reluctance to impose a per se standard or presumption of ineffective assistance of counsel on licensed attorneys, favoring instead the Strickland test which considers the quality of the representation in relation to the outcome of the proceedings. See e.g., United States v. Cronic, 466 U.S. 648 (1984). In Cronic the Court stated that:

> "The right to effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the

> accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." (citations omitted) United States v. Cronic at 658.

Contrary to petitioner's contentions the opinion below in no way conflicts with either decisions of this Court or decisions rendered in the various circuit courts. In an effort to create the appearance of a conflict petitioner refuses to acknowledge the factual distinctions explicitly recognized by the various circuit courts which declined to apply a per se ineffective assistance of counsel rule to cases, such as this one, where a criminal defendant is represented at the outset of the proceedings by a licensed attorney who is subsequently disbarred for reasons unrelated to that defendant's representation.

Petitioner relies upon cases which can clearly be distinguished on the facts: imposters posing as attorneys; cases where no attorney was provided; conflict of

interests cases; and cases involving the issue of waiver of right to counsel.

Finally, we note that petitioner failed below to demonstrate that the actual representation he received at the Huntley hearing falls short of the standards enunciated by this Court in Strickland. Thus petitioner's claim of actual ineffectiveness at the Huntley hearing must also fail.

II. NO FEDERAL EVIDENTIARY HEARING IS REQUIRED WHERE THE STATE TRIAL COURT RECORD SUPPORTS THAT COURT'S FACTUAL AND LEGAL FINDINGS.

Petitioner received a complete and fair evidentiary hearing on the issue of the voluntariness of his confession in the state trial court during his Huntley hearing. The state court made specific factual determinations based on the witnesses and evidence presented by both the prosecution and the petitioner, and determined that the confession was voluntarily made. The trial court's factual determinations were properly afforded a presumption of correctness since

they are amply supported by the record and turn on issues of witness credibility. Miller v. Fenton, 474 U.S. 104 (1985); Townsend v. Sain, 372 U.S. 293 (1963).

Nothing in the record supports petitioner's claim that the courts below failed to focus or make findings on a dispositive issue. The claim petitioner raises concerning being forced to remain naked on a metal chair during two hours of interrogation was specifically raised at the Huntley hearing by petitioner, and specifically denied by the prosecution. The trial court obviously did not credit petitioner's account on this issue since that court specifically stated in its findings at the Huntley hearing that "[Petitioner] was undressed for physical inspection and the presence of a laceration on the inside of his left thigh was noticed." This statement virtually parallels the prosecution witness' testimony on this issue.

Moreover, this Court has held that

although the voluntariness of a confession is a mixed question of fact and law which warrants independent federal determination, subsidiary questions such as "whether in fact the police engaged in the intimidation tactics alleged by the defendant" are factual questions to be decided by the trial court and that court's finding, if supported by the record, is entitled to a presumption of correctness and should be given great consideration by the federal habeas court. Miller, 474 U.S. at 112.

Thus the federal habeas corpus court correctly deferred to the trial court's factual findings and acted properly in denying petitioner a federal evidentiary hearing.

CONCLUSION

FOR THE ABOVE AND FOREGOING REASONS, RESPONDENTS RESPECTFULLY REQUEST THAT THIS COURT DENY THE PETITION FOR A WRIT OF CERTIORARI.

Dated: November 14, 1989

Respectfully submitted,

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